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In the Supreme Court of the United States

OCTOBER TERM, 1986

BOARD OF TRUSTEES OF ALABAMA STATE UNIVERSITY,
PETITIONER

v.

ALABAMA STATE BOARD OF EDUCATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

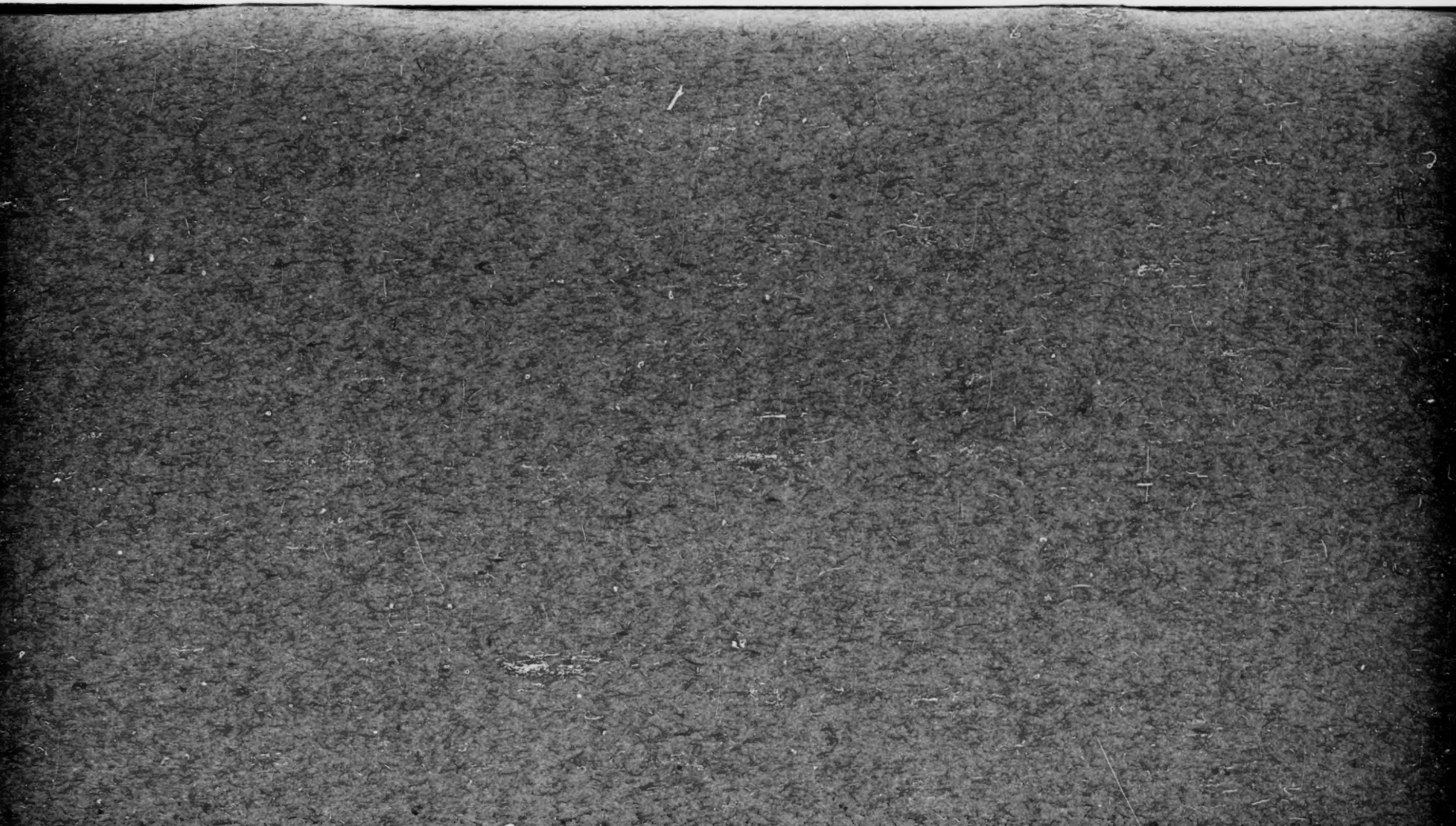
BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

JESSICA DUNSAY SILVER
MARK L. GROSS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217



QUESTION PRESENTED

Whether the court of appeals erred in holding that petitioner, a state university, lacks standing under the Equal Protection Clause and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, to challenge for its own benefit the racially discriminatory actions of the state-created system of higher education of which it is a part.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 791 F.2d 1450. The opinion and orders of the district court (Pet. App. 17a-28a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 29a-30a) was entered on June 6, 1986. A petition for rehearing was denied on July 10, 1986 (Pet. App. 31a-32a). On September 29, 1986, Justice Powell extended the time for filing a petition for a writ of certiorari to and including November 7, 1986. The petition for a writ of certiorari was filed on November 7, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, prohibits recipients of federal financial assistance from discriminating on the basis of race in federally assisted programs or activities. In July 1983, the United States filed suit in the United States District Court for the Northern District of Alabama, alleging that the State of Alabama. the Alabama State Board of Education, and all state-supported four-year institutions of higher education in the State of Alabama had been maintaining a racially segregated system of higher education in violation of Title VI and the Equal Protection Clause of the Fourteenth Amendment (Pet. App. 2a). Petitioner, Alabama State University (ASU), a predominantly black college located in Montgomery, Alabama, was among the institutions that the United States named as parties defendant (*ibid.*).

Petitioner subsequently moved the court to realign it with the United States as a party-plaintiff (Pet. App. 2a). In so moving, petitioner argued that the "interests of the codefendants [were] antagonistic to [its] interests" (App., *infra*, 3a) and that it had "an interest * * * in obtaining essentially the same relief demanded by plaintiff" (*id.* at 2a). At approximately the same time, a class representing graduates of ASU, black adults or minor children in Alabama presently attending or eligible to attend an Alabama higher education institution in the Montgomery, Alabama area, and black citizens who were or might become employed by these higher education institutions moved to intervene as a party plaintiff (Pet. App. 2a). The court granted both petitioner's and the intervenors' motions (*ibid.*).

2. In August 1985, while the case was pending in the district court, the Alabama State Board of Education determined that it would not recertify certain of petitioner's undergraduate and graduate teacher education programs (Pet. App. 3a). Petitioner and the intervenors moved the district court preliminarily to enjoin the Alabama State Board of Education from doing so (*ibid.*). In seeking the injunctive order, petitioner alleged that it would "suffer immediate and irreparable injury, loss, and damage if defendants [were] permitted to decertify" these programs (App., *infra*, 4a-5a). The court issued the requested preliminary relief, finding that the decision not to recertify the teacher education programs was racially motivated (Pet. App. 22a) and that the status quo should be maintained until the underlying action brought by the United States could finally be resolved (*id.* at 23a).

3. On appeal of the district court's issuance of the preliminary injunction, the court of appeals affirmed in part and reversed in part (Pet. App. 1a-16a). While it rejected the "broad contention that [petitioner], as a creature of state government, has no federally protected rights whatsoever under the Constitution or laws of the United States" (*id.* at 4a), the court found both that "[petitioner], as a creature of the state, may not raise a Fourteenth Amendment claim under Section 1983" (*id.* at 6a) and that "[n]othing in Title VI or its legislative history suggests that Congress conceived of a state instrumentality as a 'person' with rights under this statute" (*id.* at 8a). Thus, it concluded that "[petitioner] has no standing under Section 1983 and Title VI to seek the injunction *sub judice*" (*id.* at 9a). Concomitantly, however, the court found "that the trial

court's entry of the preliminary injunction sought by the * * * intervenors against the Board was entirely appropriate" (*id.* at 13a-14a), reasoning that "[t]he standing of the * * * intervenors remains unchallenged" (*id.* at 9a), that "even the partial demise of [petitioner] would impede the ability of the trial court—and this [c]ourt on review—to remedy any violation of law proved in the statewide action originally brought by the United States and joined by the * * * intervenors" (*id.* at 14a-15a), and "that the intervenors had a substantial likelihood of success on the merits" (*id.* at 15a). Accordingly, the court affirmed "entry of this injunction, on behalf of the intervenors, against the members of the [S]tate Board in their official capacities," and reversed "the district court's entry of any injunction on behalf of [petitioner] * * *" (*ibid.*).

ARGUMENT

The decision below is correct. It does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

1. An entity like petitioner clearly may not invoke the Equal Protection Clause or Title VI to challenge for its own benefit the racially discriminatory actions of the state-created system of higher education of which it is a part. This Court has long held that, "[b]eing but creatures of the State, municipal corporations have no standing to invoke the * * * provisions of the Fourteenth Amendment of the Constitution in opposition to the will of their creator" (*Coleman* v. *Miller*, 307 U.S. 433, 441 (1939)). See generally *Williams* v. *Mayor of Baltimore*, 289 U.S. 36, 40 (1933); *Risty* v. *Chicago, R.I. & Pac. Ry. Co.*,

270 U.S. 378, 389-390 (1926); *Trenton* v. *New Jersey*, 262 U.S. 182, 188 (1923); *Hunter* v. *Pittsburgh*, 207 U.S. 161, 179 (1907). Title VI likewise is designed to protect individual rights and, in enacting that statute, Congress made no suggestion that it was granting state-created entities any rights that heretofore were unavailable under the Fourteenth Amendment. Cf. *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 287 (1978) (opinion of Powell, J.) (Title VI proscribes "only those racial classifications that would violate the Equal Protection Clause"); *id.* at 328 (opinion of Brennan, White, Marshall, Blackmun, JJ.) (same). Accordingly, the decision of the court below—that a state-created entity like petitioner may not rely on either the Equal Protection Clause or Title VI to challenge for its own benefit the discriminatory actions of the state that created it—is correct.

2. Petitioner in fact acknowledges that this Court's cases "hold[] that in general disputes between arms or creatures of a State do not implicate federal rights" (Pet. 6). Petitioner notes, however, that "[i]n none of those cases * * * was there an argument—or a situation calling for such an argument—that the state-created entity making the claim was doing so on behalf of persons who indisputably have federal rights, or was doing so in pursuit of its own obligation under the Supremacy Clause to conform its conduct to the federal Constitution or a federal statute" (*ibid.*). Likewise, petitioner notes that, "[w]here such an argument *has* been made, state-created entities or members of boards of state-created entities have uniformly been allowed to sue to enforce the equal protection clause and similar constitutional or statutory provisions" (*id.* at 6-7

(emphasis in original)). Accordingly, petitioner contends that the court below erred in failing to "address the argument that the Board of Trustees of Alabama State University could raise claims either as a representative of its students and faculty, or in pursuance of the Board members' obligation to carry out their own oaths of office to obey the Constitution as the Supreme Law of the Land * * *" (*id.* at 5).

This contention is unfounded. The court below could not address an argument that petitioner did not present to it. Petitioner did not argue to the court of appeals that it was representing the interests of its students, faculty, or administrators. Rather, petitioner argued only that it had standing as an *institution* to seek the preliminary injunction. Accord, Ala. U. Br. in Opp. 5-6, 11. Thus, in answering respondents' argument to the court of appeals that petitioner was without standing, petitioner contended only that "Alabama State University as a creature of the State has federally protected rights under the Constitution and the Laws of the United States" (ASU C.A. Br. 21). Accordingly, the court below had only to decide "whether any given constitutional provision or law protects *the interests of the body in question*," to wit, petitioner. See Pet. App. 6a (emphasis added). Petitioner's recharacterization of its cause in its petition for a writ of certiorari cannot change the question presented to and decided by the court below.[1]

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[1] It may be that petitioner *intended* to argue to the court of appeals that it was representing the interests of its students, faculty, and administrators as well as the interests of the institution as a whole. In the district court, for example, petitioner alleged that it had "an interest * * * in obtaining essen-

Petitioner therefore errs (Pet. 5-10) in suggesting that the decision below conflicts with decisions of this Court and other courts which have held that state-created entities may challenge on behalf of their students and faculties the discriminatory actions of their state-creators. The school boards in the cited cases either alleged that a state statute or some other state action required a constitutional or statutory duty to be violated (see, *e.g.*, *State of Washington* v. *Seattle School District No. 1*, 458 U.S. 457 (1982); *Board of Education* v. *Allen*, 392 U.S. 236 (1968)), or that they were representing the constitutional rights of their students or faculty (see, *e.g.*, *Akron Board of Educ.* v. *State Board of Education*, 490 F.2d 1285 (6th Cir.), cert. denied, 417 U.S. 932 (1974); *Bradley* v. *School Board*, 338 F. Supp. 67 (E.D. Va.), rev'd on other grounds, 462 F.2d 1058 (4th Cir. 1972), aff'd by an equally divided court, *sub nom. School Board* v. *State Board of Education*, 412 U.S.

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tially the same relief demanded by plaintiff" (App., *infra*, 2a-3a) as well as that the "realigned * * * Board of Trustees for Alabama State University will suffer immediate and irreparable injury, loss, and damage if defendants are permitted to decertify [its teacher education] programs" (*id.* at 4a-5a). Indeed, petitioner even filed claims in the district court alleging that certain policies of the state had adversely affected its students and faculty. See Amended Claims of Realigned Party-Plaintiff Board of Trustees For Alabama State University, No. CV 83-C-1676-S (N.D. Ala. Nov. 21, 1984). While these claims were severed from the litigation in which the preliminary injunction was issued, petitioner may well believe that it is entitled to continue to represent those interests in litigating the issues that the United States has raised. If so, petitioner should have made its intentions to do so clear to the court of appeals. It did not, however, and the court of appeals should not be faulted for failing to decipher petitioner's unstated intentions.

92 (1973); *Little Rock School District* v. *Pulaski Co. Special School District No. 1*, 584 F. Supp. 328, 352 (E.D. Ark. 1984)). Here, by contrast, petitioner alleged only that its own institutional interests were in issue. Thus, it is clear that petitioner asks this Court to resolve a conflict that does not exist.

Petitioner's claim (Pet. 10-11) that its standing must be recognized so that the interests it now purports to represent will not be disadvantaged is equally meritless. The United States and the intervenors in this litigation have adequately represented and will continue adequately to represent the students and faculty of the Alabama schools—the persons who would truly benefit from the desegregation of the Alabama system of higher education. In contrast, as its presentation in the court of appeals evidences, petitioner's principal concern has been with its own institutional interests. Thus, petitioner's further participation as a plaintiff in this case is clearly unnecessary.

In any event, this case presents a particularly unattractive vehicle in which to address the standing question that petitioner raises. The preliminary injunction that petitioner sought remains in force by virtue of the intervenors' standing; thus, the question petitioner presents would have no effect on the relief issued in the case. Moreover, the larger and ultimate questions raised by this litigation are currently pending before the Eleventh Circuit; petitioner seeks standing to raise challenges which are essentially duplicative of those raised by the United States and the intervenors. In these circumstances, we do not believe that review of the issue petitioner raises is appropriate or necessary.

2. Finally, there is no merit to the contention (Pet. 11-12) that the court below erred in addressing

the issue of petitioner's standing. To be sure, this Court has held that, where one party has standing, an appellate court *need* not consider the standing of other parties to maintain its jurisdiction, See *Secretary of the Interior* v. *California*, 464 U.S. 312, 319 n.3 (1984); *Watt* v. *Energy Action Educational Foundation*, 454 U.S. 151, 160 (1981); *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 264 & n.9 (1977). But the Court has never held that, in such circumstances, an appellate court *may* not decide whether the other parties have standing. Early resolution of such standing questions will often clarify the legal rights and duties of adverse parties and promote the economy of the litigation that remains. That is precisely the situation here—as petitioner apparently concedes. See Pet. 12 ("this case will go through further proceedings and further questions about petitioner's role will probably be raised"). Accordingly, the court below clearly did not err in addressing petitioner's standing.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

JESSICA DUNSAY SILVER
MARK L. GROSS
Attorneys

JANUARY 1987

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Case No. CV-83-C-1676-S

UNITED STATES OF AMERICA, PLAINTIFF

vs.

THE STATE OF ALABAMA, ET AL., DEFENDANTS

[Filed Aug. 5, 1983]

MOTION OF DEFENDANT BOARD OF TRUSTEES FOR ALABAMA STATE UNIVERSITY FOR REALIGNMENT AS PARTY-PLAINTIFF

The Board of Trustees for Alabama State University (hereinafter called "ASU") hereby moves to be realigned and treated as a party-plaintiff in this case. In support of this motion, defendant ASU represents and shows unto the Court the following:

1. Complaint in this case alleges, *inter alia*, that since 1953 the defendants, by their policies and practices, have maintained and perpetuated a dual system of public higher education based on race, and

have failed to take affirmative steps to remove the vestiges of the dual educational system resulting from their policy of racial segregation in education.

2. The defendant ASU, recognizing the continued existence of a racially dual system of higher education in the Montgomery geographical area, proposed, through the administrative officers of Alabama State University, in January, 1980, the merger of Auburn University at Montgomery (hereinafter "AUM") and Troy State University at Montgomery (hereinafter "TSUM") into Alabama State University under the control and governance of the Board of Trustees for Alabama State University and with the name Alabama State University.

3. By resolution adopted January 15, 1981, the defendant ASU reaffirmed merger of AUM and TSUM into Alabama State University as the most equitable and effective method to disestablish the racially dual system of higher education in Montgomery. (A copy of the resolution is attached hereto as Exhibit I, incorporated herein by reference, and made a part hereof as if herein set forth in full.)

4. Defendant ASU has thus asserted, and is asserting a right to relief similar to that sought by plaintiff.

5. Defendant ASU, through the administrative officers of Alabama State University, has exerted every effort available to it to completely desegregate the faculty, staff and student body of Alabama State University.

6. Questions of law and fact common to defendant ASU and plaintiff will arise in this action.

7. Defendant ASU has an interest in the subject of this action in obtaining essentially the same relief demanded by plaintiff.

8. No party's rights will be adversely affected by realignment as the interest of defendant ASU coincides with that of plaintiff.

9. The interests of the co-defendants are antagonistic to the interests of the defendant ASU.

WHEREFORE, defendant ASU respectfully prays that this court take cognizance of this Motion, and after careful consideration of the matters and things set forth herein, enter an Order, pursuant to and in accordance with Federal Rules of Civil Procedure, Rules 20 and 21, realigning defendant ASU as party-plaintiff in this action.

Respectfully submitted,

GRAY, SEAY & LANGFORD

By: /s/ Solomon S. Seay, Jr.
SOLOMON S. SEAY, JR.
352 Dexter Avenue
Montgomery Alabama 36104
(205) 269-2563

Attorney for Board of Trustees
for Alabama State University

[Certificate of Service Omitted]

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. CV-83-C-1676-S

UNITED STATES OF AMERICA, PLAINTIFF

vs.

THE STATE OF ALABAMA, ET AL., DEFENDANTS

[Filed Sept. 26, 1983]

MOTION AND NOTICE FOR TEMPORARY RESTRAINING ORDER

Realigned Plaintiff Board of Trustees for Alabama State University hereby moves this Court for a Temporary Restraining Order restraining and enjoining the defendants Alabama State Board of Education and Wayne Teague, State Superintendent of Education, their agents, employees, successors, attorneys, and all persons in active concert and participation with them, from failing and refusing to take the necessary steps to recertify the following Education Programs at Alabama State University, pending a hearing and determination of realigned plaintiff's Motion for Temporary Restraining Order and/or Preliminary Injunction: Class A Superintendent, Class AA Superintendent, Class A General Supervisor, Class AA General Supervisor, and Class AA Reading Supervisor.

Unless this motion is granted, realigned plaintiff Board of Trustees for Alabama State University will suffer immediate and irreparable injury, loss and damage if defendants are permitted to decertify the above-enumerated programs until a hearing can be had on this motion, as more fully appears from the verified Complaint attached hereto.

DATED this 13th day of August, 1985

Respectfully submitted,

/s/ Solomon S. Seay, Jr.
SOLOMON S. SEAY, JR.

/s/ Terry G. Davis
TERRY G. DAVIS

Attorneys for Realigned Plaintiff
Board of Trustees
for Alabama State University
732 Carter Hill Road
Post Office Box 6215
Montgomery, Alabama 36106
(205) 834-2000

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